IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 23, 2008 Session

JEFFREY S. WHITAKER v. JACK MORGAN, WARDEN and STATE OF TENNESSEE

Appeal from the Criminal Court for Morgan County
No. 9067 E. Eugene Eblen, Judge

No. E2007-02884-CCA-R3-HC - Filed February 24, 2009

The petitioner, Jeffrey S. Whitaker, was denied habeas corpus relief by the Criminal Court for Morgan County from his eight convictions for rape of a child for which he received three consecutive sentences of fifteen years, with the remaining fifteen-year sentences running concurrently, for an effective sentence of forty-five years. On appeal, he contends that the trial court erred in (1) denying relief because the record of the proceedings shows he was sentenced illegally and (2) not applying judicial estoppel against the State. We affirm the trial court's dismissal of the petition but remand the cause to the trial court for transfer to the convicting court for correction of the judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed and Cause Remanded

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Robert L. Vogel, Knoxville, Tennessee, for the appellant, Jeffrey S. Whitaker.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Senior Counsel; and Joe H. Walker, District Attorney General, for the appellee, State of Tennessee.

OPINION

The eight judgments in the record reflect that the petitioner was sentenced to fifteen years as a Range I, standard offender for each conviction. The box for "child rapist" is not checked on any of the eight judgments, although Tennessee requires a child rapist to serve a sentence in its entirety, "undiminished by any sentence reduction credits such person may be eligible for or earn." T.C.A. § 39-13-523(b) (Supp. 1994) (amended 1998, 2007). The record reflects that other counts against the petitioner for child rape and aggravated sexual battery were dismissed pursuant to the plea agreement, on which the petitioner was labeled a "Range I, standard" offender. On direct appeal, this court affirmed the imposition of consecutive sentences for the petitioner as a Range I offender.

State v. Jeff Whitaker, No. 03C01-9509-CC-00256, Roane County, slip op. (Tenn Crim. App. Oct. 15, 1996), app. denied (Tenn. Feb. 8, 1999.) This court affirmed the denial of post-conviction relief on the petitioner's claims of ineffective assistance of counsel and involuntary guilty pleas. State v. Jeffrey Whitaker, No. E2001-02399-CCA-R3-PC, Roane County, slip op. (Tenn. Crim. App. June 3, 2003).

The guilty plea acceptance hearing transcript reflects that the parties understood the agreement involved a sentence of forty-five years to be served "in its entirety," even though the petitioner was a Range I offender. The sentencing hearing transcript reveals the State began its argument for a sentence of forty-five years at one hundred percent. The transcript shows defense counsel stated that the minimum sentence available to the trial court was a fifteen-year sentence "day for day, no parole, no good and honor time" and that the petitioner would have to serve the sentence with no credits and would not receive parole. The sentencing transcript shows the trial court imposed a "sentence to serve" consisting of three consecutive fifteen-year sentences, with the other sentences running concurrently.

After appointing counsel and holding a hearing on the petition, the trial court dismissed the petition for habeas corpus relief, finding that not placing a check in the child rapist box on the judgments was a clerical error, such that the petitioner had not demonstrated the judgments were void. The trial court found as well that the petitioner had made no showing that his sentences had expired.

The petitioner contends on appeal that he received a sentence as a Range I, standard offender with a thirty percent release eligibility date. Relying on Archer v. State, 851 S.W.2d 157 (Tenn. 1993), and McLaney v. Bell, 59 S.W.3d 90 (Tenn. 2001), he claims the trial court lacked jurisdiction to impose a sentence contrary to Code section 39-13-523, the law mandating a one hundred percent service requirement for child rapists. The petitioner asserts that any ambiguities in a plea agreement should be construed in favor of the petitioner, and he requests this court to vacate the denial of habeas corpus relief, to vacate his eight guilty pleas, and to remand the case to the sentencing court for trial or for a new plea agreement.

The State replies that the trial court properly denied relief in view of the petitioner's failure to state a cognizable claim for habeas corpus relief. The State additionally argues that "to the extent the judgments do not accurately reflect the sentences actually imposed by the convicting court," a clerical error may be corrected at any time. Tenn. R. Crim. P. 36.

The determination of whether habeas corpus relief should be granted is a question of law which we review de novo on appeal. Hart v. State, 21 S.W.3d 901, 903 (Tenn. 2001). Habeas corpus relief will be granted when the petitioner can show that a judgment is void, not merely voidable. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). To this end, a writ of habeas corpus is granted only "when it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered that a court lacked jurisdiction or authority to sentence a defendant or that the sentence has expired." Stephenson v. Carlton, 28 S.W.3d 910, 911 (Tenn. 2000) (citing Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993)). The burden is on the petitioner to establish that

the judgment is void or that a sentence has expired. See Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000); State ex rel. Kuntz v. Bomar, 381 S.W.2d 290, 291-92 (1964). If the petitioner carries this burden, he is entitled to immediate release relative to that judgment. Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994) (citing State v. Warren, 740 S.W.2d 427, 428 (Tenn. Crim. App. 1986)). However, the trial court may dismiss a petition for writ of habeas corpus without an evidentiary hearing and without appointing a lawyer when the petition does not state a cognizable claim for relief. Hickman v. State, 153 S.W.3d 16, 20 (Tenn. 2004); State ex rel. Edmondson v. Henderson, 421 S .W.2d 635, 636-37 (1967) (citation omitted); see also T.C.A. § 29-21-109 (2000).

In the present case, the petitioner has not met his burden to demonstrate that the sentences actually imposed were illegal. Review of the sentencing hearing transcript reveals that the State, defense counsel, and the court stated that the fifteen-year sentences were to be served at one hundred percent in compliance with the "child rape law." Although the trial court stated that "the sentence will have to be 15 years on each count, as a Range I offender, by law," the trial court imposed, in its next sentence, three consecutive sentences and said that each was a "sentence to serve. There's no portion with that." The judgments, in contrast, do not include the one hundred percent service time. Where the transcript and judgments conflict, the transcript controls. State v. Davis, 706 S.W.2d 96, 97 (Tenn. Crim. App. 1985) (citing State v. Zyla, 628 S.W.2d 39, 42 (Tenn. Crim. App. 1981)).

The petitioner contends that the trial court erred in not applying judicial estoppel against the State in the present proceedings. He argues that the State claimed during the post-conviction process that the petitioner received the benefit of his plea bargain, a thirty percent early release eligibility, and that the State should have been precluded from arguing in this case that the petitioner did not in fact receive a sentence allowing an early release date. The State responds to this claim in a footnote, in which it states that the State's post-conviction pleading included the "erroneous statement" that the petitioner received the benefit of his sentencing bargain.

As we stated above, the record does not show that the petitioner's judgments are void. While we acknowledge that the judgments should have been corrected earlier, the petitioner's allegations of judicial estoppel require examination outside the record. See Taylor v. State, 995 S.W.2d at 83 (holding that "[a] voidable conviction or sentence is one which is facially valid and requires the introduction of proof beyond the face of the record or judgment to establish its invalidity.") Because the petitioner alleges a claim for relief from a voidable judgment, this is not a cognizable claim for habeas corpus relief, which may only be granted for void judgments. The petitioner is not entitled to relief.

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court denying habeas corpus relief, but we remand the cause to the trial court for transfer to the convicting court for correction of the judgments.

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JOSEPH M. TIPTON, PRESIDING JUDGE